TA because a 50-pound brake falling from the tracks could lead to severe injuries to pedestrians and outstanding liability for the TA. Issues were ongoing, and rather than write up Plaintiff, Mr. Easter transferred her within the 240 shop to the car desk unit, hoping she would succeed and gain additional experience. (Leibovitz Dep. 8, Aug. 15, 2022).

Mr. Easter was required to complete Plaintiff's annual evaluation and her management performance review ("MPR") by September 2021. On September 17, 2022, Mr. Easter submitted Plaintiff's MPR with an overall grade of "marginal," and Plaintiff signed this MPR. Pl. Ex. 3. Mr. Easter gave her a "marginal" because he held her responsible for the problems at the 240 shop. Plaintiff's failure to communicate effectively with her subordinates and her lack of technical skills were also reasons why she received a "marginal." (Easter Dep. 95:1-10, June 24, 2022). In Plaintiff's MPR, Mr. Easter noted that she lacked the technical skills required for her position. Plaintiff also attested to her inability to address specific technical problems. However, a "marginal" grade does not immediately affect one's employment status. Instead, it highlights areas where an individual needs improvement; the TA will then set forth goals and action items for the individual to address these issues. Pl. Ex. 26. The TA's system is created to help employees improve; this is the TA investing in its employees and not a form of punishment. The MPR is valuable because it is used as a measurement to ensure that employees are meeting the standards necessary to keep subways safe and to invest in employees when they lack a particular skill.

On September 23, 2021, Plaintiff heard about an incident where her fellow Deputy Superintendent Russel Woodley, sexually harassed a car cleaner. Plaintiff followed TA policy guidelines and reported these allegations.

On December 3, 2021, Plaintiff learned of her transfer to the Overhaul Shop at 207th Street ("207 shop"). Vice President Hoffman decided to transfer Plaintiff to receive the necessary

technical training so that she could be more successful in positions requiring superior knowledge of subway trains. (Hoffman Dep. 34, June 16, 2022). At the 207 shop, Plaintiff was mentored by Richard Buffington, an experienced technician whose been with the TA since 1977. (Hoffman Dep. 53, June 16, 2022). Additionally, Mr. Hoffman decided to overrule Mr. Easter and changed Plaintiff's overall MPR rating to a "good" and her other two technical skill "marginal" ratings to "good." (Hoffman Dep. 34, June 16, 2022). Despite Plaintiff's lack of technical skills, Mr. Hoffman took these actions based on his understanding of Plaintiff's work and because he wanted to provide her with technical training without hindering her career. (Hoffman Dep. 34, June 16, 2022).

Mr. Easter made no changes to Plaintiff's MPR grade after submitting it on September 17, 2022, and only learned about its change in December 2021. Pl. Ex. 3.

Plaintiff now brings a Title VII retaliation suit against Defendants for giving her a "marginal" MPR grade and for transferring her to the 207 shop. However, the transfer to the 207 shop notably did not decrease Plaintiff's salary. She got a raise, kept the same title, had a team to manage, and received mentorship and technical training.

ARGUMENTS

DEFENDANTS DID NOT RETALIATE AGAINST PLAINTIFF FOR REPORTING A SEXUAL HARASSMENT INCIDENT

Title VII Section 704(a) prohibits employers from retaliating against employees for opposing discriminatory practices. 42 U.S.C.A. §2000e-3(a).

Retaliation claims under Title VII are evaluated under a three-step burden-shifting analysis. First, Plaintiff has the burden of persuasion to establish a prima facie case of retaliation by showing: "(1) participation in a protected activity [and] that the defendant knew of the protected activity; (2) an adverse employment action; and (3) a causal connection between the protected

activity and the adverse employment action." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973); Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010).

If Plaintiff sustains this initial burden, "a presumption of retaliation arises." Hicks, 593 F.3d at 164. The burden then shifts to the Defendant to produce and "articulate a legitimate, non-retaliatory reason for the adverse employment action." Id. Once Defendant-employer articulates a legitimate non-retaliatory reason for the alleged adverse employment action, the presumption of retaliation dissipates, and the burden shifts back to Plaintiff, via the burden of persuasion, to show that this reason was pretextual. Zann Kwan v. Andalex Group LLC, 737 F.3d 834, 839 (2d Cir. 2013); Hicks, 593 F.3d at 164.

This brief will argue that, first, Plaintiff failed to establish her initial prima facie burden of retaliation. Specifically, she failed to show there was (A) an adverse employment action; and (B) she failed to show a causal connection between the filing of her sexual harassment complaint and the alleged adverse employment action. Second, even if she was to make her initial prima facie burden, Defendants proffered legitimate non-retaliatory reasons for giving her a "marginal" overall MPR grade and for transferring her. Third, Plaintiff cannot prove by the burden of persuasion that the proffered legitimate non-retaliatory reasons were pretextual.

Defendants do not dispute that Plaintiff acted in good faith when she reported an alleged incident of sexual harassment or that the TA did not have knowledge of her reports. Therefore, this brief will not address these elements of the retaliation claim.

I. Diane Leibovitz Failed To Meet Her Initial Prima Facie Burden Of Retaliation.

Plaintiff failed to show that the TA's employment actions had a materially adverse effect on her because the conduct was beneficial to her, normal TA practice and the terms and conditions of her employment remained the same. Plaintiff also failed to establish a causal link between the

sexual harassment report with the TA's alleged adverse conduct because these actions were in motion before her report.

A. Plaintiff failed to establish adverse action because her transfer was beneficial to her, normal TA practice, and the terms and conditions of her employment remained the same.

"[W]hen considering a retaliation claim, Courts look to see whether the employment actions were materially adverse. Burlington Northern and Santa Fe Ry Co. v. White, 548 U.S. 53, 67 (2006). Materially adverse employment actions are those that deter or "dissuade a reasonable worker from seeking or supporting a charge of discrimination." Id. at 57. There is no per se bright-line rule; instead, Courts will look at the particular circumstances of each case to determine the significance of any given act of retaliation in its context. Id. at 67. However, the threshold inquiry in finding adverse employment action is that the action must entail: (1) a change in working conditions that are more disruptive than a mere inconvenience; or (2) an alteration of job responsibilities. Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003).

Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguishable title, a material loss of benefits, and significantly diminished material responsibilities. Id. at 138. A negative evaluation is not, by itself, sufficient to constitute a materially adverse employment action. Sanders v. New York City Human Resources Admin., 361 F.3d 749, 756 (2d Cir. 2004). However, negative or critical evaluations can support a case of retaliation when Plaintiff can offer proof that the evaluation affected the terms and conditions of their employment. Id. For a Plaintiff to establish that regular disciplinary actions or corrective actions, either on their own or in conjunction with other acts, were retaliatory, they must present evidence that these actions demonstrated a departure from the

organization's normal practices. Rivera v. Rochester Genesee Regl. Transp. Auth., 743 F.3d 11, 26 (2d Cir. 2014).

Trivial harms, petty slights, or minor annoyances do not amount to adverse employment action. Tepperwien v. Energy Nuclear Operations, Inc., 663 F.3d 556, 571 (2d Cir. 2011). Even if a Plaintiff can demonstrate that the employer engaged in multiple trivial actions, it does not amount to retaliation. Id. at 572. Criticism of an employee is part of training and is necessary for employees to develop and improve; thus, criticism by an employer is not automatically an adverse employment action. Weeks v. New York State (Div. of Parole), 273 F.3d 76, 85 (2d Cir. 2001).

Here, Plaintiff fails to establish a prima facie case of retaliation. First, the MPR grade had no adverse effect on Plaintiff. Her initial grade was "marginal," but it ultimately became "good." During the time between her "marginal" and "good," she had the same salary, received the same benefits, held the same title, and the terms and conditions of her employment all remained the same. Moreover, Mr. Easter followed normal TA practice when he gave her this grade. This grade, alongside its detailed comments, was meant to highlight areas where she needed improvement. This is not an adverse action but merely constructive criticism necessary for Plaintiff's professional development.

Second, Plaintiff's transfer to the 207 shop was also normal TA practice; TA employees are always transferred for training or promotions. Plaintiff herself has been transferred seven times during the past five years. Her transfer to the 207 shop benefited her because she was mentored by Richard Buffington, a TA technician since 1977 with a wealth of operational and technical experience. Under Mr. Buffington, Plaintiff could get the technical training required for someone in her position. See Galabya v. New York City Bd. of Educ., 202 F.3d 636, 641 (2d Cir. 2000) (for a transfer to be considered materially adverse action, a Plaintiff must show that the transfer created

a materially significant disadvantage). This is part of the TA system: ensuring subway riders that their operational employees are adequately equipped with the technical skills to do the job.

Plaintiff may argue that she felt anxious for the four months before receiving an overall "good" on her MPR in December and therefore suffered an adverse action. However, this argument fails because it is normal for the TA to finalize her grades around December. Moreover, during this period, the conditions of her employment remained the same. She might also argue that the transfer to the 207 shop placed her in a non-budget position and thus was adverse. However, this argument also fails because she held the same title and received a pay raise while at the 207 shop. See, e.g., Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) (if a transfer does not create a significant change in the conditions of employment, and if it only changes some of the plaintiff's job responsibilities, then this transfer cannot be considered materially adverse); Kessler v. Westchester County Dept. of Soc Services., 461 F.3d 199 (2d Cir. 2006) (the Court found no adverse action by the transfer of the plaintiff because it was not less prestigious nor was it less suited to her skills and experience).

Therefore, Plaintiff suffered no materially adverse action to support her retaliation claim.

B. Plaintiff failed to show a causal connection because the Defendant-employer's action began before she reported sexual harassment.

Title VII retaliation claims require proof of but-for causation that the unlawful retaliation would not have occurred in the absence of the employer's alleged wrongful action or actions. University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 360 (2013). But-for causation does not require proof that retaliation be the sole cause of the employer's alleged adverse action. However, Plaintiff must show that the adverse action would not have occurred in the absence of the retaliatory motive. Zann Kwan, 737 F.3d at 846. Plaintiffs often seek to establish causation indirectly through temporal proximity at the prima facie stage by showing that the

alleged adverse employment action followed the protected activity closely in time. Id. at 845. However, employers are not obligated to abandon corrective measures upon learning of a Plaintiff's protected activity. Clark County School Dist. v. Breedan, 532 U.S. 268, 274 (2001) ("[e]mployers need not suspend previously planned transfer upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitely determined, is no evidence whatever of causality.") (emphasis added).

Here, Plaintiff cannot show that her transfer to the 207 shop and MPR grade would not have occurred if she had not reported the alleged sexual harassment. Plaintiff's well-documented performance problems began before she filed her report, and the Defendants had already begun to take corrective actions. Mr. Easter, in August 2021, reassigned Plaintiff from inspections to car desk because of her lack of operational knowledge. Mr. Easter drafted, signed, and submitted Plaintiff's annual MPR, with a "marginal" grade, on September 17, 2021, and Plaintiff filed the sexual harassment report six days later, on September 23, 2021. Mr. Easter always intended for his evaluation of Plaintiff to be a "marginal" overall rating. Moreover, due to the 240 shop's poor performance and low morale, Mr. Hoffman already intended to "blow" the 240 team up. Thus, these corrective measures by Defendants were already in motion before Plaintiff's report.

Therefore, there is no causal link between her sexual harassment report and her transfer to the 207 shop and MPR grade to support her retaliation claim.

II. The TA Proffered A Legitimate Non-Retaliatory Reason For Transferring the Plaintiff.

If Plaintiff could establish her initial prima facie burden, it then shifts to the employer to articulate some legitimate, non-retaliatory reason for the employment action. Zann Kwan, 737 F.3d at 845. This showing is easily satisfied. See, e.g., Zann Kwan, 737 F.3d at 845 (unsuitability of skills and poor performance satisfies as a legitimate reason for employment action); Jute v.

Hamilton Sunstrand Corp., 420 F.3d 166, 179 (2d Cir. 2005) (company restructuring satisfies as a legitimate reason for employment action); Wang v. State Univ. of New York Health Scis Ctr. At Stony Brook, 470 F.Supp.2d 178, 185 (E.D.N.Y. 2007) (factual discrepancies regarding a plaintiff's professional background and verification of professional credentials satisfies as a legitimate reason for employment action); Giscombe v. N.Y.C. Dep't of Educ., 39 F. Supp. 3d 396, 403 (S.D.N.Y. 2014) (allegations of sexual misconduct requiring disciplinary action satisfies as a legitimate reason for employment action); Quinn v, Green Tree Credit Corp., 159 F.3d at 770-71 (2d Cir. 1998) (employee's history of rudeness towards clients and coworkers satisfies as a legitimate reason for employment action).

Here, the legitimate non-retaliatory reason for transferring Plaintiff was that she lacked the technical knowledge to perform her duties as a Deputy Superintendent. Her shortcomings are well documented: (1) the subway cars' brake shoes incident under her supervision; (2) consistent air conditioning system malfunctions under her watch; (3) her lack of technical skills; and (4) her failure to communicate effectively to subordinates. All these issues were documented. Instead of firing her, the TA invested in her by transferring her to get the proper training and mentorship.

Therefore, Defendants satisfied their burden to proffer a legitimate non-retaliatory reason for their alleged adverse actions.

III. Plaintiff Failed To Show That Defendants' Non-Retaliatory Reasons Were Pretextual.

Once an employer offers a legitimate non-retaliatory reason for the alleged adverse action, the burden shifts back to Plaintiff to show that this reason was pretextual. A Plaintiff may show pretext by demonstrating weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons that would raise doubt in the fact finder's mind that the employer did not act for those reasons. Zann Kwan, 737 F.3d at 839, 845 (finding the

employer's reasons were pretext because they waivered by giving two extremely different reasons for their action toward the plaintiff).

Mere conclusory allegations cannot dispel Defendants' non-retaliatory legitimate reasons as pre-textual. Wang, 470 F.Supp.2d at 185. While temporal proximity is sufficient to show causation at the initial prima facie level, temporal proximity alone cannot rebut the employer's legitimate non-discriminatory reason as pretextual. El Sayed v, Hilton Hotels Corp., 627 F.3d 931 (2d Cir. 2010). Thus, to show pretext, Plaintiff must combine temporal proximity with other evidence, such as inconsistent employer explanations. Zann Kwan, 737 F.3d at 848.

Here, The TA's reason for Plaintiff's transfer never wavered. She was transferred because she lacked the proper technical skills and training to perform her job safely. Mr. Easter always intended to give Plaintiff a "marginal" grade – hence, he did it before her sexual harassment report. Furthermore, revising the MPRs is a normal TA practice. First, the direct supervisor will grade the employee, and after a few revisions and a few months, the Vice President will sign off on the final grade. Every reason Defendants provided are legitimate and not pretextual because they were either the company's normal practice or the conduct was already in motion and decided before Plaintiff's complaint.

Therefore, Plaintiff cannot establish a retaliation claim because Defendants' legitimate non-retaliatory reasons are not pretextual.

CONCLUSION

Plaintiff failed to establish a prima facie case of retaliation. She failed to prove that her report of sexual harassment was the but-for cause of her MPR grade and her transfer to the 207 shop. On the other hand, Defendants successfully met their burden and offered a legitimate non-retaliatory reason for Plaintiff's transfer and MPR grade. These reasons were also not pretextual

because transferring employees for additional technical training is a normal TA practice, and Mr. Easter's "marginal" grade of Plaintiff's occurred before her report. Therefore, the Court should dismiss this retaliation claim.

Applicant Details

First Name	**Daniel**
Last Name	**Zonas**
Citizenship Status	**U. S. Citizen**
Email Address	**danielzonas@yahoo.com**
Address	**Address** Street **3000 Chautauqua Ave #222** City **Norman** State/Territory **Oklahoma** Zip **73072**
Contact Phone Number	**2392502578**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oklahoma College of Law** **http://law.ou.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Oil and Gas, Natural Resources, and Energy Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Nicholson, Daniel
dnicholson@ou.edu
Jon, Lee
jon.lee@ou.edu
Gensler, Steven
sgensler@ou.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

6/23/2023

Judge Walker:

I am writing to apply for a 2024-2025 clerkship with your chambers. I moved from Naples, Florida to Norman, Oklahoma to start my legal career in 2021, and I am now a 3L at the University of Oklahoma College of Law.

I like researching and writing about novel legal issues. As far as I can tell, clerking for you would be the best opportunity in the world because a federal docket contains almost every type of case there is.

I would do great work as a federal clerk. I am an Articles Editor for the Oklahoma Oil and Gas, Natural Resources, and Energy Journal, so I will be editing and proofreading my peers' work during the 2023–2024 schoolyear. During my internships, I have drafted countless pleadings and other papers, including a brief that was argued at the Oklahoma Supreme Court. I've researched and written memoranda on all sorts of topics, everything from defenses for criminal charges to the viability of a nuisance claim arising from dog barking. My supervising attorneys rely on my work because I make sure it's correct and clearly written. Nevertheless, when I write, I like to focus not just on accuracy and clarity, but also conciseness. Every sentence is more words that the reader needs to slog through, so I keep wordiness to a minimum.

I am confident that my educational and professional experience will make me an asset. Please let me know if we can schedule an interview. I want this clerkship, and I will work hard for you if I get it.

Respectfully,
Daniel Zonas

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

Education

University of Oklahoma College of Law 2021–2024

- GPA: 9.339/12.0 (equivalent to 3.4/4.0)
- Rank: 59 of 201
- Articles Editor for the Oil and Gas, Natural Resources, and Energy Journal
- Dean's Honor Roll Fall 2021 and Spring 2023
- Amicus Society Public Interest Fellow, over 250 pro-bono hours

Florida State University 2017–2021

- B.A. in Philosophy

Professional Experience

Jason Waddell, PLLC Summer 2023
Law Clerk *Oklahoma*

- Drafted a Brief in Support of Application for Writs of Prohibition & Mandamus regarding an Order enforcing overbroad subpoenas duces tecum.
- Drafted countless pleadings, including a Motion for Summary Judgment for a breach of contract claim, a Motion to Strike regarding improper affidavits, and a response to a Motion to Dismiss for a dog bite case.
- Attended many depositions and hearings.

Mazaheri Law Firm Spring 2023, Summer 2023
Law Clerk *Oklahoma*

- Drafted a Response to a Position Statement for a Title VII retaliation claim.
- Drafted many research memoranda, including the legality of a tipping policy, defenses for a reckless conduct charge, and venue for a property dispute.
- Drafted several divorce decrees and an antenuptial agreement.
- Drafted many demand letters, EEOC charges, and discovery requests.

Oklahoma County District Attorney's Office Summer 2022
Law Clerk *Oklahoma*

- Assisted ADAs in the Oklahoma County Diversions program.
- Managed restitution for Diversion Court participants.
- Attended many trials, hearings, and arraignments.
- Drafted a Motion to Dismiss for the Felonies Team.

Schwartz & Zonas Summer 2018, Summer 2019
Receptionist *Florida*

- Handled client intake for personal injury and criminal defense attorneys.

The University of Oklahoma College of Law

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Grade Points

A+	12
A	11
A-	10
B+	9
B	8
B-	7
C+	6
C	5
C-	4
D+	3
D	2
D-	1
F	0

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW UNOFFICIAL TRANSCRIPT

Zonas, Daniel Patrick
716 W Saint Augustine St
Tallahassee, FL 32304-4330

Course	Dept	No.	Hours	Grade
Fall 2021				
Legal Foundations	LAW	6100	1	S
Property	LAW	5234	4	B+
Torts	LAW	5144	4	A-
Research/Writing & Analysis I	LAW	5123	3	B+
Civil Procedure I	LAW	5103	3	B+
GPH: 14	GPS: 130	HA: 15	HE: 15	GPA: 9.286
Spring 2022				
Criminal Law	LAW	5223	3	B+
Civil Procedure II	LAW	5203	3	A-
Intro to Brief Writing	LAW	5201	1	B+
Constitutional Law	LAW	5134	4	B
Oral Advocacy	LAW	5301	1	B
Contracts	LAW	5114	4	B
GPH: 16	GPS: 138	HA: 16	HE: 16	GPA: 8.625
Summer 2022				
Extern Placement	LAW	6400	3	S
Issues in Professionalism	LAW	6400	2	S
GPH: 0	GPS: 0	HA: 5	HE: 5	GPA: 0.000
Fall 2022				
Evidence	LAW	5314	4	A
Trademarks	LAW	6223	3	A-
Oil and Gas	LAW	6540	3	B
Professional Responsibility	LAW	5323	3	B+
ONE J	LAW	6331	1	S
GPH: 13	GPS: 125	HA: 14	HE: 14	GPA: 9.615
Spring 2023				
Family Law	LAW	5443	3	B+
Secured Transactions	LAW	5750	3	A-
Torts II	LAW	6100	2	B+
Oil and Gas Contracts and Tax	LAW	6550	3	A
Tort Law/Communications Media	LAW	6700	2	A
GPH: 13	GPS: 130	HA: 13	HE: 13	GPA: 10.000
Fall 2023				
Crim Pro: Investigation	LAW	5303	3	

Income Taxation of Individuals	LAW	5463	3	
Civil Pretrial Litigation	LAW	5530	3	
Unincorporated Entitities	LAW	5733	3	
Workers' Compensation	LAW	6100	2	
Trial Techniques	LAW	6410	3	
GPH:	GPS:	HA:	HE:	GPA:

	GPH	**GPS**	**HA**	**HE**	**GPA**
OU CUM:	56	523	63	63	9.339

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The University of Oklahoma

COLLEGE OF LAW

DANIEL NICHOLSON
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June 11, 2023

Dear Judge:

I am writing this letter on behalf of Daniel Zonas a law student who has applied for a federal clerkship. I had the pleasure of having Daniel as a 1L in Research/Writing & Analysis I, Intro to Brief Writing, and Oral Advocacy classes. Daniel is a diligent and capable student who has consistently shown strong skills in legal research, writing, and analysis. He has a solid understanding of complex legal concepts and has the ability to articulate them effectively in writing. In my legal writing class, Daniel produced well-reasoned legal documents, displaying his knowledge of the law and its practical application.

Apart from his academic achievements, Daniel is motivated to keep learning about the practice of law outside of classes. His resume notes that he has drafted many court documents for practicing attorneys since his 1L year. While I haven't had an opportunity to interact with Daniel since having him in class, I'm happy to see he has continued honing his legal writing and critical thinking skills.

Based on Daniel's academic performance, writing ability, and work ethic, I believe he would be a suitable candidate for a federal clerkship. I have confidence that he possesses the necessary qualities and abilities to fulfill the responsibilities of this role. He will make valuable contributions to any court he has the opportunity to join.

If I may be of further assistance, please do not hesitate to telephone or write me.

Sincerely,

Daniel Nicholson
Associate Professor of Legal Practice
OU College of Law

Professor Nicholson | Word Count: 4993 | Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

NO. 22-050

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 2022

JAMIE WHITTEN,

Petitioner,

v.

STATE OF GARNER,

Respondent.

On Writ of Certiorari to the
Garner Supreme Court

BRIEF FOR PETITIONER

Daniel Zonas
Attorney for Petitioner

Professor Nicholson Word Count: 4993 Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

QUESTION PRESENTED

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." However, some states have passed legislation prohibiting video recording of police officers without all-party consent.

The state of Garner passed an anti-surreptitious recording law prohibiting the creation of any sort of recording containing any conversation without all-party consent or prior warning. After recording her own arrest during a rowdy protest and subsequent interactions with her arresting officers, Whitten was charged with violating the statute.

Did this application of the Garner statute violate Whitten's First Amendment rights?

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OPINIONS BELOW

The opinion of the District Court is unavailable. The opinion of the Supreme Court of Garner is available in the Record. (R. at 2–8.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This case also involves the interpretation and application of Garner Statute title 75, § 52, which prohibits recording any conversation "without the consent of all parties" or otherwise without warning. (R. at 8–9.)

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STATEMENT OF THE CASE

Jamie Whitten attended an animal rights protest at Wild Animal Safari, where there was a large crowd being subdued by law enforcement. (R. at 3–4.) The protest was an open demonstration that took place on private property open to the public. (R. at 6.) While police officers attempted to control the protestors, Whitten began recording the protest on her iPhone. (R. at 4.) She then placed her phone in her pocket while it continued to record. (R. at 4.)

Subsequently, Whitten was arrested on unrelated charges. (R. at 4.) She continued to record as she was being arrested. (R. at 4.) Whitten recorded her conversation with the police officers while in the patrol car. (R. at 4.) Her iPhone continued to record until just before she was placed in her holding cell, where it was confiscated and the recording was terminated by the police. (R. at 4.)

Whitten was charged with violation of Garner's Anti-Surreptitious Recording Privacy Law for filming her arrest and later conversation with the police in the patrol car. (R. at 5.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Supreme Court of Garner and remand this case for further proceedings. The Fourteenth Circuit is made an outlier among precedent from other circuits from this decision, and the Supreme Court of Garner caused an artificial circuit split to turn into a real circuit split. Other circuits have held that one has a First Amendment right to record police officers

performing their duties in public spaces, and Whitten's case falls within these boundaries.

The Garner statute limits recording rights, which infringes upon First Amendment rights. The statute prohibits the recording of conversations without consent. The recordings created through this activity are categorically different from any other sort of recordings. Since the statute's goal of privacy cannot be justified without reference to this type of content, the Garner statute is content-based and should be analyzed under strict scrutiny.

Even if this Court must apply intermediate scrutiny, the Garner statute is still unconstitutional as applied to Whitten. Under intermediate scrutiny, protecting police privacy as individuals undermines the right of the public to receive information about government activity. As such, the government interest in the Garner statute is not substantial and cannot be justified under intermediate scrutiny.

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ARGUMENT AND AUTHORITIES

THE GARNER ANTI-SURREPTITIOUS RECORDING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO JAMIE WHITTEN.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The right to freedom of speech listed in the First Amendment to the U.S. Constitution is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). The state of Garner's Anti-Surreptitious Recording Privacy Law is competing with the right to free speech in this case. (R. at 8.) The state of Garner passed this statute under its authority to protect a person's general right to privacy, a privilege granted to the states. *Katz v. United States*, 389 U.S. 347, 350–51 (1967). This regulation prohibits recording a conversation surreptitiously or otherwise without consent or prior warning. (R. at 8–9.) The regulation leaves an exception for verified journalists, who are granted authority to film interactions between police officers and citizens by being immune to the Garner statute. (R. at 9.)

The Garner statute burdens First Amendment rights, as the right to free speech encapsulates free sharing of information, which entails the right to create such information. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). Furthermore, the state of Garner's purpose in enacting this legislation is to regulate specific content, conduct that warrants analysis under strict constitutional scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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This Court should reverse the Garner Supreme Court's ruling and find the Garner statute unconstitutional as applied to Whitten. Applying the Garner statute to individuals recording police officers performing their duties on public property and private property open to the public violates fundamental rights of individuals granted under the First Amendment. These rights are substantial enough to render the Garner statute unjustifiable.

This case involves a constitutional inquiry and is therefore reviewed de novo. U.S. Const. art. III, § 3; *see also Marbury v. Madison*, 5 U.S. 137 (1803).

A. The Garner statute should be analyzed under strict scrutiny.

1. The Garner statute restricts First Amendment rights.

The First Amendment of the Constitution of the United States holds, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This extends beyond the right to share information and includes the right to create such information, like an audiovisual recording. *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012). The right to free speech "would be insecure, or largely ineffective, if the antecedent act of *making* [a] recording is wholly unprotected . . . ." *Id*. Agreement is "practically universal" that a primary purpose of the First Amendment is to protect "free discussion of government affairs." *Id*. at 597. The government may not overstep the First Amendment protection of the free sharing of information by simply regulating the means by which such information is gathered. *Id*. Protecting a video under the

First Amendment but not the creation of that video "defies common sense." *Wadsen*, 878 F.3d at 1203.

The Garner statute prohibits audio and/or video recordings of conversations without all-party consent. Whitten was charged with violating this statute in relation to the recording she produced in the police car. Plainly, this statute prohibits the creation of certain audiovisual recordings, behavior that is protected by the First Amendment. So, the Garner statute restricted Whitten's First Amendment rights.

2. The Garner statute is a content-based restriction, and should be subject to strict scrutiny.

Statutes that burden constitutional rights are unconstitutional unless they are able to survive an applicable level of scrutiny. *Alvarez*, 679 F.3d at 601–02. Freedom of expression is "subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). These restrictions are valid if they are content-neutral and meet an intermediate scrutiny standard. *Id*. Contrarily, content-based restrictions must meet the standard of strict scrutiny. *Alvarez*, 679 F.3d at 603. Content-neutrality depends on the purpose of the regulation in question. *Id*. "Regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). If a regulation's purpose is unrelated to the content of expression, it's content-neutral. *Ward*, 491 U.S. at 791. This holds true even if "it has an incidental effect on some

speakers or messages but not others." *Id*. Thus, "[t]he government's purpose is the controlling consideration." *Id*. A law is content-based if it was enacted "because of disagreement with the message [speech] conveys." *Id*. Importantly, a "facially content-neutral" law can be content-based if it "cannot be "'justified without reference to the content of the regulated speech . . . .'"" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).

The Garner statute distinguishes and prohibits some types of content. It disallows recordings made secretly, and allows recordings made with consent or a warning. Secret recordings are different in content from recordings made with consent. Individuals who know they are being recorded act differently than if they are being recorded secretly, entailing different recordings being made. Crucially, if both secret and permissive recordings were to share the same content, there would be no purpose served in banning one of them but not the other. So, the Garner statute necessarily categorically bans some types of content.

The fact that the Garner statute bans some types of content and not others does not entail that it's content-based. Instead, one must look to the government's purpose to determine whether the statute is content-based. The government's purpose in the Garner statute can be found in its name, "Anti-Surreptitious Recording Privacy Law." (R. at 8.) Clearly, the regulation was put in place for the sake of individual privacy. However, what is also present in the statute title is the means by which the state attempts to achieve this end, "Anti-Surreptitious

Recording." So, the goal of the statute is individual privacy, and the means is the prohibition of secret recordings.

A surreptitiously recorded video may have no definitive signs that it was recorded without consent. However, it remains unique content enabled by one's ability to record without consent. Such a recording would not exist without an ability to create it. Furthermore, once it does exist, the government cannot distinguish content that was secretly recorded from content that was recorded with consent even though they are separate types of content, one of which the government has an interest in prohibiting.

It's important to understand that the means are intimately tied to the ends of the Garner statute. The statute cannot be construed without regulating specific content. In fact, the only reason the statute is effective is because it regulates expression based on the substance of that expression's content. According to *Turner*, the purpose of intermediate scrutiny being applied to content-neutral regulations is because they don't pose as much risk in eliminating certain viewpoints. However, the Garner statute is wholly founded on which content the government deems appropriate.

Content that is obtained surreptitiously is not regulated because of the means through which it was obtained. Instead, it's regulated because of government disapproval of the content itself. The regulation of surreptitiously gathered content is not incidental, but the integral and primary goal of the statute. The goal of privacy in this statute's context cannot be justified without reference to its means,

which consists of content discrimination and regulation. As such, in congruence with the standard in *Reed*, the Garner statute is content-based and should be subject to strict scrutiny.

B. The Garner statute survives neither intermediate nor strict scrutiny as applied to Jamie Whitten and is therefore unconstitutional.

In order to survive strict scrutiny, a law must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Wadsen*, 878 F.3d at 1204. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a substantial government interest." *Ward*, 491 U.S. at 789. If a law fails an intermediate scrutiny test, it will also fail a strict scrutiny test. *Alvarez*, 679 F.3d at 604. However, if a law does not fail an intermediate scrutiny test, it may still fail a strict scrutiny test. *Id.*

Although strict scrutiny should apply to this case, the Petitioner recognizes the possibility that this Court may not accept its argument for strict scrutiny. Even if intermediate scrutiny should apply, however, the Garner statute does not survive and is unconstitutional as applied to Whitten. Strict scrutiny is a heightened form of intermediate scrutiny, maintaining the same elements and relationship between them. Therefore, the following argument will be tailored to the less constitutionally demanding standard of intermediate scrutiny, but remains unchanged in substance if strict scrutiny is determined to be the applicable standard.

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1. Individuals have a right to record police officers performing their duties in public spaces.

The driving force behind the right to record police officers performing their duties is the interest the public has in the "free discussion of government affairs." Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 Case W. Res. L. Rev. 1897, 1908 (2014). There is a significant "role of police recordings in exposing police conduct to the public." *Id.* at 1903. This interest is substantial, and a muscle that is used to "distinguish a free nation from a police state." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Distinctly, "a person's general right to privacy" is "left largely to the law of the individual states." *Katz*, 389 U.S. at 350–51.

Numerous circuits have recognized a right to record police officers performing their duties in public spaces. Gregory T. Frohman, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action* 1897, 1940 (2014). In fact, on this question, there only exists an "artificial circuit split," where some courts affirm the right exists and others dodge the question by instead dealing with qualified immunity and whether the right is "clearly established." *Id.* This strategy stems from the decision in *Pearson v. Callahan*, where the Supreme Court vested discretion in district and circuit court judges to decide which prong of qualified immunity should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). These prongs are, (1) whether there is a violation of a constitutional right, and (2) whether that right was clearly

established at the time. *Id*. If a court chooses to tackle prong (2) and finds that a constitutional right is not clearly established, its analysis could end there. *Id*. In fact, because of this allowance, no courts have specifically denied the existence of the right to surreptitiously record police officers performing their duties. Frohman, *supra* at 1940.

In *Shevin v. Sunbeam Television Corp.*, a Florida wiretapping statue's constitutionality was challenged. *Shevin v. Sunbeam Television Corp*., 351 So. 2d 723, 725 (Fla. 1977). Sunbeam Television Corp., a news company, claimed that "secret recordings" prohibited by the statute had value to the public in that they assured accuracy of recordings made. *Id*. However, the court found the statute to be constitutional, holding that "hidden mechanical contrivances are not indispensable tools of news gathering." *Id*. at 727. Some cases have established an affirmative right to secretly record police officers performing their duties. *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017). In *Fields v. City of Philadelphia*, two individuals, one of which was arrested, brought suit against the city for retaliation against their recording of police officers performing duties on a public sidewalk and at a convention center, respectively. *Id*. at 356. *Fields* affirmed the individuals had a First Amendment right to carry this out, citing the importance of accessing "information regarding public police activity." *Id*. at 359. Furthermore, in *Glik*, an individual was arrested after videotaping police officers carrying out another individual's arrest in a park. *Glik*, 655 F.3d at 79. The court found through an unabridged qualified immunity analysis that this person had a First Amendment

right to film the arrest because it was a "matter of public interest" and was carried out in a public space. *Id.* at 84.

In addition to citing a "right to record matters of public interest," the court noted that "news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 83–84. The latter point was supported by the idea that one's right to access information is "coextensive" with that of the press, and a contemporary news story is "just as likely" to be produced by an individual as an actual reporter. *Id.* Additionally, in *Smith v. City of Cumming*, an individual was prevented from taking a video of police actions in violation of his First Amendment rights. *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000). The court determined that the individual did in fact have this right to film, and nothing that the "press generally has no right to information superior to that of the general public." *Id.* at 1333.

The court in *Shevin* did not err in its ruling, and presents no impediment to Whitten's case. *Shevin* is similar to the instant case in that it involves a wiretapping statute prohibiting a type of recording that is valuable to the public. However, the major difference is that the challenge to the Florida wiretapping statute makes no reference to recording police officers. This fact is what sets *Shevin* apart from Whitten's case and prevents it from contributing to the circuit split on this issue.

The case at hand is much more similar in nature to *Fields* and *Glik*, which involve the videotaping of police officers. A rationale frequently cited in these types

of cases includes informing the public of police activity and newsgathering for dissemination of government affairs. This rationale is not mentioned in *Shevin*. The available cases addressing whether one has a First Amendment right to record police officers while performing their public duties show a clear trend in the affirmative. The public has an undeniable right to monitor the proper fulfillment of police duties, which should be subject to only reasonable restrictions. This is the integral component of Whitten's case that sets her aside from other newsgatherers such as the one in *Shevin*.

One might argue that the Garner statute overcomes the need to afford the public this right to record by granting special privileges to "verified journalists." (R. at 9.) However, this does not stop the statute from violating essential public First Amendment rights. This Court should follow precedent from *Glik* and *Smith* on this issue. While such an exception allows a pathway for exposure of police conduct, *Glik* makes a relevant note that this right is shared by all of the public, and cannot be limited to just reporters. Contemporary technology standards don't make reporters obsolete, but they do influence the scope of people able to gather information. When that information is of particular First-Amendment-protected public interest, government limitation is unconstitutional. In a society with protected free speech, it is important to ensure every person has a right to access information, without qualifications and restrictions.

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The government's interest in individual privacy is not compelling enough to overcome the individual First Amendment right to record police officers performing their duties in public.

2. The right to record police officers performing their duties includes private property that acts as a public space in addition to public property.

The reasoning in *Glik* is limited to "public" spaces. *Glik*, 655 F.3d at 84. The recording in *Glik* took place in a public park. *Id.* at 79. However, in *Gericke v. Begin*, an individual was arrested for filming another individual's traffic stop. *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014). The court cited *Glik* in affirming the individual's right to film, saying that the activity was "carried out in public." *Id.* at 7. *Project Veritas Action Fund v. Rollins*, another First Circuit case, acknowledged a lack of clarity in this standard. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560, 211 (2021). This court consolidated *Glik* and *Gericke*, saying their settings encompass "inescapably public spaces" like "traffic stops" and "public parks," but neither case confirmed nor denied the capacity of a "publicly accessible private property" to count as a "public space." *Id.* In *Fordyce v. City of Seattle*, an individual was arrested after filming police officers and their interactions with a crowd at a protest. *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995). After his charges were dismissed, he brought an action against the city for violation of his first amendment rights. *Id.* The court in this case ruled the plaintiff had a "First Amendment right to film matters of public interest." *Id.* at 439.

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Glik and *Gericke* have both affirmed a right to record in "public." This is useful because it effectively includes public property, which was the setting for both cases. Part of Whitten's charges include her recordings made on public property, in the back of a police car. This setting qualifies as a public space that is "inescapably" public, as it matches up to the *Rollins* standard closely. The interior of a moving police car is hardly different from the traffic stop in *Gericke*. Both take place on public property, and can be viewed by anyone on the street. Thanks to elaboration on the public area constraint from *Gericke*, Whitten's recording inside a publicly-owned police car is very closely analogous to the car in *Gericke* and requires almost no speculation as to whether this location is included in *Glik*. Therefore, Whitten's filming inside a publicly-owned police car is included in the rights affirmed in *Glik*.

However, these cases have not elaborated on whether this includes privately-owned property that acts as a public forum, like the site of Whitten's protest. Whitten's public protest took place at Wild Animal Safari, and included over twenty individuals. (R. at 3–4.)

The analysis in determining whether police should be free from recordings on private property is a determination of what, if anything, has changed in the transfer of setting from public to private property. In other words, the question is whether police officers should have more of a right to privacy, and whether the public has any less of an interest in observing their behavior.

Individuals are only afforded the right to record police officers while they are performing their duties. Just as this public interest no longer exists while their

duties are not being performed, it exists perpetually as long as police duties are being performed. The public has no less interest in sharing and discussing government action on private property than on public property.

The protest at Wild Animal Safari utilized private land as a public forum, and was meant to be seen and heard. The setting of *Fordyce* was a protest that took place on public property. Whitten filmed police interactions like the plaintiff in *Fordyce*. There is no practical reason to separate these two cases besides the simple labels of "public" and "private" property. Functionally, Wild Animal Safari's private property acted in the same way as the public property in *Fordyce*. Just as a police officer would not expect his actions to be private in the protest in *Fordyce*, he could not reasonably expect his actions to be private at the Wild Animal Safari protest. Therefore, police expectation of privacy remains unchanged.

One's right to record police performing their duties in public areas is not contingent on whether a location is public or private, but the function of this location. Police officers performing their duties still have trust placed in them, no matter what sort of property they are on. Therefore, the individual right to record police officers performing their duties should extend to private property that acts as a public space.

3. The right to record should not be limited to third-parties.

In *Glik*, in addition to affirming a general right to record police officers performing their duties in public spaces, the court mentioned that this right is subject to "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84.

The *Glik* court stated that the individual recorded police officers "from a comfortable remove" and didn't "molest them in any way," so his actions satisfied this requirement. *Id*. This standard is shared by *Smith*. *Smith*, 212 F.3d at 1333.

These cases raise potential questions regarding who might be able to record police interactions because they involve third parties filming an arrest, not the actual person being arrested.

The reasonable time, place, and manner restrictions mentioned in *Glik and Smith* indicate that the right to record is also limited in scope to non-intrusive recordings. This is the source of the line "from a comfortable remove" in *Glik*. The purpose of this was not to say police interactions can only be filmed from a "comfortable remove," but that the individual in *Glik* could not have overstepped his constitutional right to record. The ways a person can interfere with an arrest are tremendously limited when that person films from a distance. Filming up-close as a third party presents at least a physical obstacle for police duties. However, this is irrelevant in Whitten's case. Whitten is filming as she is getting arrested. Because the officers did not realize she was recording until she was being searched, Whitten's recording clearly did not interfere with the arrest in any significant way.

The First Amendment right made out in *Glik* and *Smith* was never meant to be exclusively enjoyed by a third-party. Non-intrusiveness, not distance, is the qualifier in these cases, and Whitten falls into this category. A person being arrested has just as much of a right to film police officers performing their duties in

public spaces as anyone else, contingent only upon the time, place, and manner in which the filming is conducted.

CONCLUSION

This Court should reverse the Garner Supreme Court's decision and remand the case for further proceedings. The Garner statute's goal of individual privacy cannot be justified without reference to the category of content it bans. Therefore, it must survive strict scrutiny.

Even if this argument is not accepted, the Garner statute violates Whitten's First Amendment rights and survives neither strict nor intermediate scrutiny. There is a clear pattern in numerous circuits that shows a constitutional right to record police officers performing their duties in public places. Whitten recorded police officers in a reasonable manner, place, and time. This Court should affirm the right established in the First Circuit to preserve free discussion of government affairs.

Respectfully submitted,

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CERTIFICATIONS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief for Petitioner was served on all parties on March 14, 2022, by depositing the briefs in the U.S. Mail, postage prepaid or by personal delivery.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4993 words, including every page except appendices.

Respectfully submitted,

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